

CHARLES A. MICHALEK, ESQ.
Nevada Bar No. 5721
ROGERS, MASTRANGELO, CARVALHO & MITCHELL
700 South Third Street
Las Vegas, Nevada 89101
Phone (702) 383-3400
Fax (702) 384-1460
Email: cmichalek@rmcmlaw.com

Attorneys for Defendant
FRONTIER AIRLINES, INC.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

PETER DELVECCHIA, individually and as
next friend of A.D., a Minor,

Plaintiffs,

v.

FRONTIER AIRLINES, INC. and
JOHN DOES 1 through 5, inclusive,

Defendants.

Case No.: 2:19-cv-01322-KJD-NJK

REPLY IN SUPPORT OF DEFENDANT
FRONTIER AIRLINES, INC.'S
PARTIAL MOTION TO STRIKE
(DOC. # 11)

**DEFENDANT FRONTIER AIRLINES, INC.'S
REPLY IN SUPPORT OF MOTION TO STRIKE (DOC. #11)**

Defendant FRONTIER AIRLINES, INC. ("Frontier"), by its undersigned counsel, pursuant to Fed. R. Civ. P. 12(b)(6) and 12(f), and for its Reply in Support of its Motion to Strike, states:

Frontier seeks to have stricken Plaintiffs' allegations and prayers for punitive damages because the alleged facts on which the punitive damages are based are insufficient to establish malice under NRS 42.005. While the Court must presume all well-pleaded allegations of material fact and must draw all reasonable inferences in favor of the non-moving party, the Court is not "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 231 F.3d 520, 527-28 (9th Cir. 2000). A district court "has discretion to determine whether the defendant's conduct merits punitive damages as a matter of

1 law.” *Young v. Mercury Cas. Co.*, No. 2:12-cv-00091-RFB-GWF, 2016 U.S. Dist. LEXIS 100227, at
 2 *27 (D. Nev. July 29, 2016). Under Nevada law, punitive damages are available “where it is proven by
 3 clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express
 4 or implied” NRS 42.005.

5 In this case, Plaintiffs argue that they have pleaded sufficient facts to establish malice. “Malice,
 6 express or implied,” is defined as “conduct which is intended to injure a person or despicable conduct
 7 which is engaged in with a conscious disregard of the rights or safety of others.” NRS
 8 42.001(3). “Conscious disregard,” in turn, “means the knowledge of the probable harmful consequences
 9 of a wrongful act and a willful and deliberate failure to act to avoid those consequences.” NRS
 10 42.001(1). *Claridge v. I-Flow Corp.*, No. 2:18-cv-01654-GMN-BNW, 2019 U.S. Dist. LEXIS 148935, at
 11 *16 (D. Nev. Aug. 30, 2019). The Nevada Supreme Court has held that the “conscious disregard”
 12 standard “plainly requires evidence that a defendant acted with a culpable state of mind,” and therefore
 13 “denotes conduct that, at a minimum, must exceed mere recklessness or gross negligence.” *Young v.*
 14 *Mercury Cas. Co.*, No. 2:12-cv-00091-RFB-GWF, 2016 U.S. Dist. LEXIS 100227, at *28 (D. Nev. July
 15 29, 2016).

16 Here, Plaintiffs allege that a flight attendant accused “Peter of engaging in illegal human
 17 trafficking and illegal sexual assault,” “forced A.D. to leave his seat and...to sit in the back row of the
 18 aircraft and refused to allow [A.D.] to return to his father for the remainder of the flight.” (Doc. # 1, ¶¶
 19 11-12) Plaintiffs further allege that Frontier arranged for a Frontier employee “to occupy the aisle seat
 20 between A.D. and the aisle of the aircraft, effectively blocking his ability to enter the aisle for the
 21 duration of the flight.” *Id.* According to the Complaint, the “Captain of the flight...suggest[ed] and
 22 authoriz[ed] those actions.” *Id.* at 14.

23 Under 14 C.F.R. § 121.533(d), “the pilot in command of an aircraft is, during flight time, in
 24 command of the aircraft and crew and is responsible for the safety of the passengers, crewmembers,
 25 cargo, and airplane.” Similarly, 14 C.F.R. § 91.3(a) provides, “the pilot in command of an aircraft is
 26 directly responsible for, and is the final authority as to, the operation of that aircraft.”
 27
 28

1 *Hanni v. Am. Airlines, Inc.*, No. C 08-00732 CW, 2008 U.S. Dist. LEXIS 58613, at *6 (N.D. Cal. July
2 11, 2008). For Plaintiffs to satisfy pleading requirements as to punitive damages, they must set forth
3 facts that establish that the Captain disregarded his legal and professional obligations and acted with an
4 intent to injure A.D., or committed despicable conduct which was engaged in with a conscious disregard
5 of the safety of A.D. *See* NRS 42.001(3). There are no facts in the Complaint, however, suggesting that
6 the Captain did anything other than act in the best interest of A.D. The Captain was notified by a flight
7 attendant that inappropriate conduct was observed, and the Captain took action to protect A.D.

8 Punitive damages cannot be available in this case because the allegations establish that the
9 conduct in question was intended to aid A.D., not for any ill purpose. Accordingly, Plaintiffs'
10 allegations regarding punitive damages should be stricken because the facts in the Complaint do not
11 establish that Frontier acted with malice.

12 WHEREFORE, Defendant FRONTIER AIRLINES, INC. respectfully requests that this
13 Honorable Court grant its Partial Motion to Strike and for such further relief as this Court deems
14 necessary and proper.

15 DATED this 19th day of September, 2019.

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17 ROGERS, MASTRANGELO, CARVALHO &
MITCHELL

18
19 */s/ Charles A. Michalek*

20 _____
CHARLES A. MICHALEK, ESQ.

21 Nevada Bar No. 5721

22 700 South Third Street

23 Las Vegas, Nevada 89101

24 Attorney for Defendant FRONTIER AIRLINES, INC.

CERTIFICATE OF SERVICE

Pursuant to LR IC 4-1, I hereby certify that I am an employee of Rogers, Mastrangelo, Carvalho & Mitchell, and on the 19th day of September, 2019, a true and correct copy of the foregoing **DEFENDANT FRONTIER AIRLINES, INC.'S REPLY IN SUPPORT OF MOTION TO STRIKE** was electronically filed with the Clerk of the Court of the United States District Court for the District of Nevada using the CM/ECF system. The foregoing document was served upon the following counsel of record as indicated below:

Timothy R. Titolo, Esq.
TITOLO LAW OFFICE
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: (702) 869-5100
Facsimile: (702) 869-5111
Email: tim@titololaw.com
Attorney for Plaintiffs

/s/ Carolyn Mangundayao

An Employee of
Rogers, Mastrangelo, Carvalho & Mitchell